Nos. 17-8151 & 17A911

IN THE

Supreme Court of the United States

RUSSELL BUCKLEW,

Petitioner,

v.

ANNE PRECYTHE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

EXECUTION SCHEDULED FOR MARCH 20, 2018

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CAPITAL CASE

In this case, the Eighth Circuit, in a published opinion, adopted novel rules of law for the litigation and disposition of as-applied challenges to a state's method of execution. The first two novel rules discussed in the petition strike a serious blow against the reliable resolution of such challenges. The first Eighth Circuit rule frustrates the truth-finding process entirely, by assuming that the execution of an inmate with a rare and highly complicating medical condition likely will go "as intended," and by closing off discovery into the skills and experience of the medical personnel involved. The second Eighth Circuit rule stacks the deck against inmates in ways we do not tolerate in any other truth-finding court process, by requiring inmates to produce a single witness willing to compare a state's proposed method with one custom-designed to account for the inmate's medical complications. Respondents barely acknowledge these new rules of law in their opposition. They refuse even to discuss the serious systemic concerns these novel rules raise. They ignore how the Eighth Circuit's opinion, and the truth-frustrating rules it announces, makes events like recent disturbing and failed executions more likely to recur.

This Court is not being asked to decide what will happen during Bucklew's execution. It is being asked to decide how best to determine what will happen, in this case and future ones raising as-applied challenges to a state's method of execution. The whole point of an adversarial process is to allow one side to test the confident assurances of the other. Discovery into the competence of medical professionals to manage predictable and serious challenges illuminates whether needless suffering is very likely. A trial at which expert witnesses whose opinions are in dispute face

skeptical cross-examination enhances confidence in how events will unfold. The Eighth Circuit has constructed an alternate process for method of execution claims that is less reliable than the one we use for any other claim. The resulting rules allow predictable and needless suffering, deliberate indifference and cruelty in violation of the Eighth Amendment, to go unchecked.

Respondents cannot defend the Eighth Circuit's rules for determining what will happen during Bucklew's execution. So they ask this Court to trust them about what will happen. Respondents spend almost the entirety of their opposition presenting a one-sided view of the record in an effort to assure this Court that Bucklew's execution will not involve needless suffering. Their view of the record departs significantly from the district court's and the Eighth Circuit's view. It is wrong, and repeatedly so, in material respects. This Court cannot and should not just trust respondents. Moreover, respondents' record-defying defense of the judgment unwittingly underscores the need for this Court's review. It punctuates the importance of a robust adversarial process. Reliability suffers when a one-sided and untested view prevails. The process for determining whether executions will go "as intended" merits this Court's attention. And this case is an ideal opportunity to do so.

I. RESPONDENTS' ONE-SIDED VIEW OF THE FACTS DEMONSTRATES THE UNRELIABILITY OF THE LITIGATION PROCESS THE EIGHTH CIRCUIT ENDORSED.

Much of what respondents say about the facts ignores evidence they do not like. Their presentation illustrates why discovery into the skills and experience of M2 and M3 is necessary to understand the magnitude of the risks Bucklew faces from Missouri's

lethal injection protocol. The litigation-resolution short-cuts that the Eighth Circuit invented, and Bucklew challenges here, are the lynchpin of a judgment that affirms an execution method that will very likely lead to needless suffering.

Starting at the beginning, respondents suggest that peripheral vein access is possible. Opp. 5, 24-25. But the district court expressly found "an apparent consensus that an IV cannot be safely inserted in [Bucklew's] peripheral veins." Pet. App. 32a. The Eighth Circuit never doubted that Bucklew will receive the lethal drug through the femoral vein. *Id.* at 10a.

That raises a critical question: *how* will M2 and M3 access Bucklew's femoral vein? Respondents assert that the record is clear that a cut-down will not be necessary because Dr. Zivot said *he* could access the femoral vein without a cut-down. Opp. 6, 25. But this assumes that M3 is as skilled and experienced as Dr. Zivot. Yet Bucklew was denied the chance to explore M3's skill and experience. So respondents are, on the one hand, denying the relevance of M3's skill and experience and, on the other hand, asking this Court to bestow on M3 the degree of skill and experience of Bucklew's expert.

The execution protocol does not dictate the procedure for gaining femoral access. Pet. App. 145a. Director Precythe has made clear that medical personnel will decide how to gain femoral access. APP0338-40 at 35:12-37:9; APP0341-42 at 43:11-44:22. Respondents do not deny that a considerable degree of pain and needless suffering is at stake in this decision. Nowhere do they deny that *if* Bucklew must lie flat during a cut-down procedure (and not even the affidavit submitted during the rehearing briefing in the Eighth Circuit suggests that Bucklew will be anything other than fully supine while M2 and M3 seek

venous access), then he will likely begin to suffocate and gag on his own blood even before the lethal drug is administered. Bucklew is very likely facing such cruel and needless suffering.

The Eighth Circuit panel *assumed* it all away by operation of law. The Eighth Circuit affirmed denying discovery into M2's and M3's skills and experience only by "assuming that those responsible for carrying out the sentence are competent and qualified to do so, and that the procedure will go as intended." Pet. App. 17a. This assumption is at the heart of a dangerously unreliable way to resolve as-applied challenges to methods of execution.

The record here illustrates how unreliable that assumption is. We know that medical personnel overseeing Bucklew's execution have used a cut-down before. APP0309 at 28:11-22; APP311-12 at 55:12-56:17. And we know that someone with the skill to access the femoral vein without a cut-down should not use it. Resp.Ex.5 at 98:8-23. The inference is clear: the medical personnel lack the skill to access a femoral vein without a cut-down. This is not speculation, as the Eighth Circuit supposed. Pet. App. 16a. And Bucklew, who bears the burden of demonstrating the extent of suffering he faces from the state's protocol, should have been allowed to uncover just how much suffering he's likely to experience *prior* to the introduction of the lethal drug. Assuming, as the Eighth Circuit declared courts should, that the skills and experience of state medical officials makes that degree of risk zero all but ensures that courts will misjudge how much suffering inmates will face.

Respondents also dispute that Bucklew will experience the sense of suffocation for several minutes *after* the lethal drug is introduced. Here, too, they depart from both the district court and the Eighth Circuit,

neither of which ruled on that ground, and both of which accepted that Dr. Zivot's view should be credited at summary judgment. Pet. App. 33a-34a, 11a. Respondents once again ask this Court to endorse short-circuiting litigation's truth-finding function by directly attacking Dr. Zivot's credibility, Opp. 34-36, and by mischaracterizing his testimony. Dr. Zivot did not base his theory on a single study from horses. *See* Opp. 30. His declaration makes clear that it is based on his 22 years of experience as an anesthesiologist. Pet. App. 107a, 109a. He consulted the horse study merely to demonstrate that Dr. Antognini's view about the speed at which the drug will render Bucklew insensate to pain was wrong. Resp.Ex.1 at 84:22-86:22. Respondents' doubts about the accuracy of Dr. Zivot's conclusions are no reason to reject them out of hand; they are reasons to test his opinions via cross-examination at trial. That would give Dr. Zivot the chance to defend himself and his conclusions. That is how our litigation system gets at the truth.

The Eighth Circuit took a different tack, but one that is no less ominous for the reliability of litigated judgments. As Judge Colloton made clear, the panel refused to allow Bucklew to rely on evidence in the record as a whole. It insisted that the comparison of the risks (*after* the administration of the lethal drug) of lethal injection and lethal gas must come from a single witness. Pet. App. 14a. Respondents insist this is, at most, error in the application of settled law. Opp. 22, 37-38. But while it is that, it is not *just* that. It is also an incorrect interpretation of this Court's decisions requiring evidence comparing the state's method with the inmate's alternative. Given the challenges inmates face finding medical experts willing to custom-design methods of execution, the Eighth Cir-

cuit's extension of *Glossip* will inhibit the reliability of judgments and warrants review.

Respondents do not stop there, though. They twist the Eighth Circuit ruling into something it is not. They suggest that the Eighth Circuit concluded that Dr. Antognini simply never opined on the length of time that Bucklew would experience suffocation if lethal gas were used. Opp. 17. But it is clear that Dr. Antognini *did* opine that lethal gas would render Bucklew insensate to suffering within 20-30 seconds. He first testified that lethal injection would render Bucklew insensate to suffering within 20-30 seconds. Resp.Ex.5 at 41:4-6. He then said that lethal gas would be "just like" lethal injection in this respect. *Id.* at 231:22-232:6, 234:13-21. Therefore, Dr. Antognini's view is that lethal gas would render Bucklew insensate to suffering within 20-30 seconds. And the Eighth Circuit panel never said otherwise. It simply ruled that a fact-finder must consider Dr. Antognini's comparison of the two methods as an indivisible whole; a fact-finder cannot compare Dr. Zivot's view of lethal injection with Dr. Antognini's view of lethal gas. Pet. App. 14a. As noted above and in the petition and by Judge Colloton, that is wrong and warrants review.

Respondents go to especially extraordinary lengths to distort the litigation process by relying on an affidavit, submitted during rehearing proceedings, to support their contention that Bucklew will not experience suffocation at all during the procedure because he will not be forced to lie fully supine. Notably, the affidavit says nothing about his position *prior* to administration of the lethal drug. So it continues Missouri's persistent refusal to address Bucklew's risk of suffering while M2 and M3 seek to gain venous ac-

cess. But beyond that, it reflects a studied indifference to Bucklew's plight.

When unconscious but still sensate to pain (the twilight stage), his struggles to breathe are *worse* when lying flat, but not absent when he is not fully supine. Pet. App. 112a ¶ V.B.1-2. It is true that he has had surgeries during which he has been required to lay flat. But during surgery, he has required a tube inserted in his throat so that he could breathe. *Id.* at 111a-112a ¶ V.A.5. He endured an MRI procedure only because, while conscious, he can manage his airway, at least while not undergoing a stressful and painful procedure that causes his tumor to leak blood down his throat.[1] One need not doubt the sincerity of the gesture toward Bucklew of assuring him that he will not lie "fully supine" during administration of the lethal drug to see how inadequate a gesture it is. It is silent as to Mr. Bucklew's other medical complications and indifferent to the serious risks they pose. Propping his head up after gaining venous access via a cut-down, and after Bucklew has long been struggling to breathe from the tumor blocking his airway and leaking blood down his throat, will not prevent the needless suffering he faces. He will still experience *all* of the suffering prior to administration of the lethal drug, and will still experience a sense of suffocation for several minutes in the twilight stage while he is unable to manage his airway.

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[1] It is true that the MRI suggested his throat tumor had, at that point, shrunk. But it was an immaterial amount, Pet. App. 114a ¶ V.C., and there is no dispute that the disease is progressive and that his tumors, over time, have worsened, *id.* at 113a ¶ V.B.10; APP0324 at 48:6-24; APP0328.

II. THIS CASE IS AN EXCELLENT VEHICLE FOR THIS COURT TO CLARIFY THE PROCESS FOR RESOLVING AS-APPLIED METHOD OF EXECUTION CLAIMS.

As anticipated, respondents spend extensive time suggesting that procedural barriers in this case will inhibit this Court's ability to reach the important questions presented by the petition. Respondents point to no vehicle issue that should deter this Court from accepting review.

Respondents suggest that the way Bucklew pleaded his claim foreclosed review of the first question.[2] Respondents point out that Bucklew maintains that no adjustment to a lethal injection protocol will adequately reduce his risk of suffering. Opp. 12. From this, respondent infers that Bucklew's theory of liability makes M2's and M3's skills and experience irrelevant. Opp. 16; *see also* Pet App. 15a. That is a *non sequitur*. The first step in comparing the risks of lethal injection and lethal gas is to fully quantify the risks of Missouri's lethal injection protocol. It is highly relevant whether, for example, Bucklew will experience a substandard, painful cut-down procedure while lying flat and choking on his tumor and blood leaking from it. That definitely will not happen if Missouri uses lethal gas.

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[2] One issue is foreclosed: the feasibility and availability of lethal gas in Missouri. Both the district court and Eighth Circuit acknowledged that respondents conceded the point. Pet. App 34a, 13a. So this Court should ignore the vague assertion that "[n]othing in the record suggests" that Missouri's gas chamber "could readily become operational." Opp. 7. There is no reason to believe a gas chamber is necessary for a nitrogen hypoxia execution. *See* APP0470.

Respondents go even further and suggest that Bucklew pleaded that lethal injection was wrongful because the drug will not circulate properly. Opp. 12. True. But he did not *only* plead that theory. Bucklew clearly *also* pleaded that he will choke on the tumor in his throat and blood leaking from it during the execution. Resp.Ex.12 at 2-3; *id.* ¶¶ 5, 15, 16. And this risk of needless suffering is increased while lying flat, but it is present while not fully supine as well. *Id.* ¶ 102; *see also* Pet. App. 112a V.B.1-2. The Eighth Circuit clearly rejected the suggestion that Bucklew did not plead the claim he is asserting.

Respondents spend the greatest effort urging that Bucklew raised his claim too late. They ignore the ample explanation in the record why Bucklew did not plead an as-applied claim in 2008, and why, when he did plead his as-applied claim, he did not combine it with the separately litigated facial challenge. No judge has sided with respondents on these arguments because they are so weak.

Bucklew first sought and was denied funding for an expert to examine him and provide any potential factual basis to bring an as-applied challenge in 2008. *See* Resp.Ex.11 at 8-9, ¶11; *id.* at 20. Contrary to respondents' suggestion, Opp. 36, his potential expert did not know enough to support a claim; he said merely that "research and evaluation" was necessary for "an accurate medical opinion" of how lethal injection would work on someone with Bucklew's condition. Resp.Ex.11 at 13-14. He requested and was denied funding for a medical expert two more times in federal court and five times in state court over the next six years. Reply ISO Prelim. Inj. at 8-12, No. 14-cv-8000 (W.D. Mo. May 16, 2014) (ECF No. 12). Only after Dr. Zivot agreed to examine Bucklew in 2014, did Bucklew obtain the factual basis for his claim.

Only then did Bucklew learn of the substantial risk posed by his obstructed airway. *See* APP0211 (observing that "the factual basis for [Bucklew's] Fourth Amended Complaint is derived from medical examinations conducted in 2014"). The statute of limitations did not begin to run until Bucklew had a reasonable factual basis, based on Dr. Zivot's agreement to examine him, to plead his claim. *See Wallace v. Kato*, 549 U.S. 384, 388 (2007).

Respondents' *res judicata* argument fails for the same reason. As this Court has observed, an as-applied challenge is not the same thing as a facial challenge, especially, as here, where they are based on different facts. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016). And the notion that Bucklew should have sought to fold his factually distinguishable as-applied challenge into the facial challenge is also unsupported. The facial challenge had been rejected and that case was nearly finally resolved by the time Bucklew filed his as-applied claim. Bucklew's as-applied claim, based on new facts, was properly brought in a new action.

Respondents suggest that the Eighth Circuit expected Bucklew's claim to fail on limitations grounds. Opp. 36. Not only is that inaccurate (the Eighth Circuit merely noted the issue, Pet. App. 84a-85a), but it ignores what happened on remand. The district court told respondents that if they wanted to pursue these procedural issues, including the limitations issue, they should develop them factually. Resp.Ex.14 at 7. Respondents never did. Their inaction speaks volumes: the procedural arguments are meritless and have always been nothing more than an effort to distract courts from the merits. No court has yet taken the bait. This Court should not be the first.

Finally, respondents urge this Court to deny review of the third question presented—whether he must plead and prove an alternative method—because Bucklew could have asked the Court to consider the issue after the Eighth Circuit vacated the dismissal order and remanded for further proceedings. Opp. 22. That is no reason to deny review now. This Court routinely chooses not to accept issues for review when further proceedings are anticipated that might moot the issue. There is no reason to punish Bucklew for waiting until it became clear that the issue is case-dispositive before asking this Court to review it.

CONCLUSION

The petition for writ of certiorari and application for stay of execution should be granted.

Respectfully submitted,

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